No 642.

Brief of Hackett for Pltffs in Error.

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SUPREME COURT OF THE UNITED STATES,

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VERSUS

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EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

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In Error to the Supreme Court of the State of North Carolina.

Argument of RICHARD N. HACKETT, Attorney for Plaintiffs in Error.

STATEMENT OF CASE.

This was an action brought to test the validity of certain bonds issued by Wilkes County in payment of its subscription to the stock of The Northwestern North Carolina Railroad Company. The suit was brought by the Commissioners of the county of Wilkes against the County Treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds, by leave of the court after the bringing of this action, became parties-defendant, and invited all other bondholders to come in and join them in resisting the action.

On the 9th of March, 1868, the Constitutional Convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as "The Northwestern North Carolina Railroad Company." Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed $100,000 to

said corporation, which subscription was held valid in "Hill v. Commissioners," 67 N. C., 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of $100,000, and they were held to be valid against the county in "Belo v. Commissioners," 76 N. C., 489, and the work of constructing said road between Greensboro, in the county of Guilford, and Winston, in the county of Forsyth, was commenced in 1868. This part of the road was completed and put into operation within the next few years and has continued to be run and operated ever since. The charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From Winston it was authorized to build branch roads. In 1887 the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes County, provided Wilkes County would subscribe $100,000 to the capital stock of said company. This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of Wilkes County by the Commissioners thereof. The vote was taken on the 16th day of June, 1887, at which time a majority of the whole qualified voters of said county voted for the subscription. Work was begun on said road shortly thereafter, and continued until the completion thereof, in 1890.

In 1888, for reasons set forth in the pleadings, another election was held on the 6th day of November, after being properly authorized and ordered by the Commissioners of Wilkes County; at which election a majority of the qualified voters of Wilkes County voted to subscribe $100,000 to the capital stock of The Northwestern North Carolina Railroad Company for the purpose of aiding in the completion of said road from Winston to Wilkesboro, said road being then partly graded and in an unfinished condition. The subscription was made and the road built to Wilkesboro in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railroad company, and, as appears by the evidence, sold to purchasers for value, and the interest thereon regularly paid until the commencement of this action. The bonds in controversy were held

invalid by his Honor, Starbuck, Judge of the Superior Court of North Carolina, from which judgment the defendants Turner and Wellborn (plaintiffs in error here) appealed to the Supreme Court of North Carolina, where the opinion of his Honor, Starbuck, Judge, was affirmed by a majority of the Supreme Court, Associate Justice Furches and Chief Justice Faircloth dissenting.

STATEMENT OF DATES.

Ordinance chartering Northwestern North Carolina Railroad Company, passed by Constitutional Convention of North Carolina, March 9, 1868.

The Constitution of North Carolina was ratified April 25, 1868.

Sections 1996 to 2000 of The Code of North Carolina first enacted in 1869.

The Code of North Carolina was adopted in 1883.

The amendments to the charter of The Northwestern North Carolina Railroad were passed in 1879, chapter 43, and 1881, chapter 156.

Charter of Northwestern North Carolina Railroad confirmed on August 11, 1868. (See agreement of counsel relative to this, in printed record.)

Work begun on Northwestern North Carolina Railroad as early as October, 1868. (See affidavits of W. H. Watkins and R. Harmon.)

Subscription of $100,000 to capital stock of Northwestern North Carolina Railroad Company voted June 16, 1887, and work began on extension of said road from Winston to Wilkesboro within ninety days thereafter, continuing till the completion of said extension in 1890.

Subscription of $100,000 to the capital stock of said Northwestern North Carolina Railroad Company again voted on November 6, 1888, and bonds in controversy issued in 1890.

ASSIGNMENT OF ERRORS.

First. That the Court erred in holding that the original charter of The Northwestern North Carolina Railroad Company

and the amendments thereto, enacted in the year 1868, did not authorize the Board of Commissioners of Wilkes County to submit the question whether said county should subscribe to the capital stock of said company, or to subscribe $100,000, with the approval of the qualified voters of said county, to the capital stock of said company. And said J. M. Turner and J. M. Wellborn, plaintiffs in error, say, that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Second. That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County was not authorized by the amendments to the charter of the said Northwestern North Carolina Railroad Company, enacted after the year 1868. And the said J. M. Turner and J. M. Wellborn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Third. That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County, was not authorized by the provisions of The Code of North Carolina, sections 1996 to 2000, inclusive. And the said J. M. Wellborn and J. M. Turner, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Fourth. That the Court erred in holding that the holders of any or all of the $100,000 in bonds, executed by the Board of Commissioners of Wilkes County, and exchanged for the capital stock of The Northwestern North Carolina Railroad Company, the validity of which is the subject of controversy in this action, were estopped by the recital in the face of the bonds

issued as to the legislation relied upon to authorize the issue of said bonds. And the said J. M. Turner and J. M. Wellborn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

ARGUMENT.

In the Supreme Court of North Carolina the defendants there, plaintiffs in error here, ultimately rested their case on an argument and brief submitted by the defendants in the case, "Commissioners of Buncombe v. Payne," which was argued ten days later, and involved substantially the same questions.

The plaintiffs in error contend here, as they insisted below, that the controversy involves the construction of statutes of North Carolina, which the highest court of the State had, either never interpreted when the contract was entered into with the purchasers of the county bonds, or which had been, prior to that time, so construed as to sustain the validity of such a contract. They also contend that the courts can not go behind the ratification of the acts by the signature of the presiding officers of the two Houses of the General Assembly. Further, quoting from the opinion of United States District Judge Purnell, of the Eastern District of North Carolina, "The National Constitution forbids the States to pass a law impairing the obligation of contracts, and that end can be no more accomplished by judicial decision than by legislation."

To sustain the validity of the bonds in question the plaintiffs further rely upon the following acts and facts:

1. The charter of "The Northwestern North Carolina Railroad Company" (ordinance passed by Constitutional Convention of North Carolina, March 9, 1868, which makes the charter of The Atlantic and North Carolina Railroad Company a part of the aforesaid charter, so far as it relates to the subscription of counties to the capital stock of said company).

2. The charter of The Northwestern North Carolina Railroad

Company, confirmed on August 11, 1868, the act confirming said charter being duly ratified by the signature of the presiding officers of both Houses of the General Assembly.

3. Sections of The Code of North Carolina, 1996 to 2000, inclusive, first passed in 1869.

Section 1996 is as follows: "The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company, or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

The other sections referred to provide how subscriptions shall be made, how elections shall be held, how interest on bonds shall be paid, and how taxes shall be paid.

It is proved, and not controverted, that work was begun on The Northwestern North Carolina Railroad prior to the passage of sections 1996 to 2000, inclusive, of The Code, in 1869, and that at the time said sections became laws, in 1869, said railroad was partially completed and in an unfinished condition. It is also proved, and not controverted, that at the time of the subscription of the bonds in controversy, in 1888, the extension of The Northwestern North Carolina Railroad from Winston to Wilkesboro was in progress of construction, and was not completed. Consequently, the plaintiffs in error claim that said subscription was authorized by said sections after a majority of the qualified voters of Wilkes County had sanctioned the same, as is admitted.

The defendants claim that the plaintiffs in error are estopped from claiming the bonds valid under sections 1996 to 2000 of The Code, inclusive, by reason of the fact that it is recited in the face of said bonds that they are issued under the Act of 1879.

In support of the positions taken by the plaintiffs in error, I shall endeavor to more effectually sustain them by, and may be pardoned for quoting extensively from, the opinions of United States Circuit Judge Simonton, in the case, "W. N. Coler & Co., No. 42, v. The Board of Commissioners of Stanly County, and I. W. Snuggs, Treasurer of said county"; and the opinion of United States District Judge, Purnell, of the Eastern District of North Carolina, in the case, "Union Bank of Richmond,

Va., v. The Board of Commissioners of Oxford," which cases are on all-fours with this. Also, the dissenting opinion of Judge Furches, of the Supreme Court of North Carolina in this very case, concurred in by Chief Justice Faircloth.

I quote from Judge Simonton's opinion in the Stanly County bond case, as follows:

"The case arises in this way. The Yadkin Railroad Company is a corporation created under the law of the State of North Carolina, authorized to construct a railroad from Salisbury south to Norwood, a point in the county of Stanly. The corporation was created by an act of Assembly in 1870, and the charter was amended by an act passed in 1887. Under provisions of the amended act, the county of Stanly was expressly authorized to subscribe to the capital stock of this railroad. The question having been duly submitted to a popular vote of the people of this county, by an overwhelming majority a subscription was authorized of $100,000, to be made in coupon bonds, some in the denomination of $1,000, and some of $500, bearing interest at the rate of 6 per cent per annum, payable on the 1st of July in each year. The County Commissioners, in accordance with this authorized subscription, prepared and issued $100,000 face value of bonds, delivered them to the railroad company, and received certificates of stock to the amount thereof, which certificates are still held for the county. The bonds were placed on the market, and were all sold to bona fide purchasers for value, among others to the Trustees of the University of North Carolina

"Each of these bonds, on its face, declares that it is one of a series issued by authority of an Act of the General Assembly of North Carolina, ratified 3d of March, 1887, and of sections 1996–1998 of The Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly County, at an election regularly held for that purpose on the 15th of August, 1889, duly ordered by the Board of County Commissioners, issued to pay the subscription made by Stanly County to the capital stock of The Yadkin Railroad Company.

"Under the terms of the act a tax was to be levied each year to pay the coupons on these bonds. In accordance therewith

such tax was duly levied each year for four successive years and the coupons paid from the proceeds thereof. The tax for the fifth year was duly levied and collected, and is in the treasury of the county. The County Commissioners, having become convinced that the bonds were illegally issued, instituted proceedings in a State court of North Carolina against the Treasurer of the county, praying that he be enjoined from paying any more coupons on these bonds. This injunction was thereupon issued by said court on the ground of the invalidity of the bonds to which said coupons belonged, and its action in the premises was confirmed by the Supreme Court of North Carolina."

* * * * * * *

"Before any examination into the merits of this case can be made, two preliminary questions must be met and decided.

"The defendants deny the jurisdiction of this court sitting as a court of equity, because, as they allege, the complainants have a plain, adequate and complete remedy at law.

"They also claim that this court will not go into an investigation of the validity of these bonds and the coupons thereof, because this is a matter already concluded with respect to the identical bonds by the Supreme Court of North Carolina, and is not only res adjudicata, but is the construction of a court of last resort of a State, of its own Constitution and statutes."

* * * * * * *

"The Supreme Court of North Carolina in Commissioners of Stanly County v. Snuggs, 121 N. C., 394, held that the bonds issued by Stanly County in aid of this railroad were void. The ground of the decision was that it did not appear affirmatively upon the Journals of the two Houses that the yeas and nays on the second and third readiing of the bill had been entered upon the Journal, as required by the Constitution. And further, that it is competent to introduce in evidence the Journal of either House of the Legislature in order to show that an act enrolled and ratified was not passed in compliance with the Constitutional requirement."

* * * * * * *

"Is not this case the determination of the court of last re-

sort in North Carolina upon the Constitution and laws of this State, which would be conclusive in this court. This brings up the merits of the case at bar.

"The general rule undoubtedly is as stated in Leiper v. Texas, 139 U. S., 467. 'It must be regarded as settled, that whether statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decisions of State courts as to what are the laws of the State are binding upon the courts of the United States.'

"But this rule has its modifications when applied to the validity of municipal bonds. This is stated thus: 'As against a party who became the owner of municipal bonds before the decision of the State court invalidating them was rendered, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound. (Enfield v. Jordan, 118 U. S., 680; Bolles v. Brenfield, 120 U. S., 759, quoted and affirmed in Barum v. Oklahoma, 148 U. S., 396.) And the same doctrine is announced and followed in Folsom v. Ninety-six, 159 U. S., 611. (See also Burgess v. Seligman, 104 U. S., 20.)

"There is also another modification of the rule first stated. That when at the date of the issue of municipal bonds the decisions of the court of last resort sustained their validity, bona fide purchasers for value are not affected by subsequent decisions, declaring them invalid.

Anderson v. Santa Anna, 116 U. S., 356.

"What, then, was the law of North Carolina as declared by the court of last resort at the date of the issue of these bonds?

"The bonds were issued in 1890 and then sold on the market. The decision in Commissioners v. Snuggs was in 1897.

"The precise question is this. The Constitution of North Carolina provides that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State directly or indirectly for the payment of any debt or to impose any tax upon the people of the State or to allow counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each House of the General Assem-

bly, and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal.

Constitution of North Carolina, article 2 section 14.

"Is it incumbent on the bondholder, or is it competent for the county to show by the Journals that no entry of the yeas and nays on the second and third readings was made on such Journal? Or is the enrollment and ratification of the act, and its signature by the presiding officers of the two Houses conclusive proof as of record that all the requirements of the Constitution were complied with, so conclusive as to preclude further inquiry? It is admitted that in the case at bar there was no such entry on the Journal.

"A question somewhat similar to this came up in Broadnax v. Groom, 64 N. C., 244.

"The Constitution of North Carolina, article 2, section 12, provides that the General Assembly shall not pass any private law unless it shall be made to appear thirty days' notice of application for such a law shall have been given under such direction and in such manner as shall be provided by law. In this case the objection was made to an act that the thirty days' notice had not been given.

"Pearson, C. J., delivering the opinion of the court, says: 'We do not think it necessary to enter into the question whether this is a public or local act or a mere private act, in regard to which thirty days' notice of the application must be given, for, taking it to be a mere private act, we are of the opinion that the ratification, certified by the Lieutenant-Governor and the Speaker of the House, makes it a matter of record which can not be impeached before the courts in a collateral way. A record until reversed importeth verity. * * * The courts must act on the maxim omnia presumantur.' It will be noticed that the Constitution in this regard does not prescribe any fixed mode in which the notice must be shown.

"In Scraborough v. Robinson, 81 N. C., 304, the question was discussed. In that case it appeared that an act of the Leg-

islature had gone through every stage required by the Constitution, had been voted upon on its second and third readings, by the yeas and nays, and these had been entered upon the Journal. It had been duly enrolled for ratification and the Journals stated that it had been duly ratified. But upon examination of it in the office of the Secretary of State, it showed an absence of the signatures of the presiding officers of the two Houses. An effort was made to declare it the law, notwithstanding this omission. Chief Justice Smith, delivering the opinion of the court, clearly expresses his opinion that the certificate and signatures of the presiding officers make a record which can not be assailed. He quotes with approval Pacific Railroad Company v. Governor, 23 Mo., 353, which lays down this doctrine and denies to the court the power to declare invalid an act which in its terms is not contrary to the Constitution, on its face is regular, where resort must be had to something behind the law itself in order to ascertain whether the Legislature, in making the law, was governed by the rules prescribed for its action by the Constitution. He also quotes with approval Pangborne v. Young, 32 N. J. Law, 29, followed in Nevada v. Swift, 10 Nevada, 176, in which the doctrine is broadly stated that a bill attested by the presiding officers is inclusive proof of the enactment and contents of a statute and can not be contradicted by the legislative journals or in any other way. But this expression of opinion by this learned Chief Justice is declared by himself to be obiter dictum. He expressly limits the decision of the court to the absolute necessity of the signatures of the presiding officers of the Enrollment Act, because it was one of the essential requirements of the Constitution. Such were the decisions of the Supreme Court of North Carolina, before and at the date of the issue of these bonds."

"Subsequent decisions of this same court throw some light upon those quoted. In Carr v. Coke, 116 N. C., 223, among the published acts appeared one of which the Journal did not show that it had been read three times in both Houses, as required by the Constitution (art. ...., sec. 23). It had, however, been duly ratified. The court held, with a strong dissent

of two of its members, that when it appears that a bill has been duly signed by the presiding officers of the two Houses of the General Assembly, declaring it to have been read three times, in each House, the courts can not go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had been passed after the requisite readings by each House, although the Journals do not show that it was so passed. Faircloth, C. J., wrote the opinion of the court and rested on the doctrine announced in Broadnax v. Groom, supra. Here it will also be noticed that the Constitution does not prescribe that the fact of three readings must be entered upon the Journals. The next is the case of the Commissioners v. Snuggs, above quoted, declaring these bonds invalid, after admitting the evidence of the Journals.

"The only decision upon the validity of municipal bonds is this last. So, when these bonds were issued, the purchaser, upon making the inquiry, as he was bound to do, did not have direct authority for believing the act Constitutional. He was governed by reasoning from authority in similar cases. This court, therefore, has the right to form its own judgment upon the matter."

"The general principle laid down by Pearson, C. J., in Broadnax v. Groom, and approved by his learned successors, Chief Justices Smith and Faircloth, has met the approval of and has been ably sustained in many States of this Union. In others it has been disputed and the contrary conclusion reached. The conflicting cases are quoted in Marshall, Field & Co. v. Clark, 143 U. S., 661, and many of them commented on in an able opinion in State v. Jones, Lawyers' Reports on Book 23 (1894), page 340."

"The question is one of power. Had the county of Stanly, under the Act of 1870-'71, power to make this subscription in bonds and to levy the tax consequent thereon? Or, perhaps, the question can be put in this way: Was the act passed by the General Assembly in the lawful exercise of the power given to it by the Constitution of the State?"

"It goes without saying that the Legislatures of the several States of the Union have full legislative power, limited only by

express provisions of the Constitution. And one of the legislative powers is the levying of a tax for such purposes as the Legislature deems public in their character, among which all the States recognize subscriptions in aid of railroads."

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United States District Judge Purnell, of the Eastern District of North Carolina, in his decision in the case, "Union Bank of Richmond, Va., v. The Board of Commissioners of Oxford," says as follows:

"The facts agreed present the following case: The town of Oxford was a duly chartered municipal corporation under the laws of North Carolina, authorized to sue and be sued, etc., as 'The Board of Commissioners of Oxford.' In 1891 the General Assembly of North Carolina passed an act to incorporate The Oxford and Coast Line Railroad Company, which act passed the Senate in compliance with the requirements of the Constitution; but in the House, it appears by the Journal, the bill passed its second and third readings on the same day and the ayes and nays were not entered on the Journal on either reading. This admission is made with the right reserved to the plaintiff of objecting thereto, unless that the court should decide such impeaching testimony is admissible under the circumstances of this case. An election was held under the act (about which no question was raised), at which a majority of the qualified voters voted for a corporation subscription of $40,000 of the capital stock of the railroad company, and bonds to that amount were duly issued."

* * * * * * *

"The defendants rest their case upon the ground that the Supreme Court of North Carolina, in a case between the same parties, reported in 119 N. C., 264, September Term, 1896, has decided these bonds invalid because of a failure in the House of Representatives to observe the requirements of article 2, section 14, of the State Constitution, the matters involved are res judicata, and the Federal courts will respect the opinion of the State Court."

* * * * * * *

"The question next arises is this one of those cases in which

a Federal Court should be governed by an opinion delivered by the Supreme Court of a State."

"Where there is a well-settled rule of property in a State or a well-settled line of decisions as to any matter of State law, or the construction of State statutes or State Constitutions, the courts of the United States will always respect these decisions and be governed by them. 'It is a settled rule of these courts,' as said Justice Swayne in delivering the opinion of the court in Gelpoke v. Dubuque, 1 Wall., 175, 'in such cases to follow the decisions of the State courts. But there have been heretofore, as there will, doubtless, be hereafter, may exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the victim.' The question involved in this case is the validity of certain bonds which the Supreme Court of North Carolina in a former decision in this identical case (116 N. C., 339), held to be valid in all essential particulars, and belongs to the domain of general jurisprudence. In this class of cases the Supreme Court of the United States, in Pine Grove Township v. Talcott, 19 Wal., 661, says: 'The United States courts are not bound by the judgments of the courts of a State where the case arises.' The National Constitution forbids the States to pass laws impairing the obligation of contracts, and that end can be accomplished no more by judicial decision than by legislation. Were these courts to yield in cases like this of oscillating opinions, or even decisions of the courts of the respective States, they would abdicate the performance of one of the most important duties with which they are charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The authorities to this effect are numerous and uniform."

"And in most of the cases cited there was a final judgment in the State Court and the matter was res judicata as far as they could make it so." "In questions belonging to the domain of general jurisprudence where commercial securities and contracts between citizens of different States are involved, the jurisdiction of the courts of the United States is absolute when sought, and these courts must hear and determine such questions independent of the tribunals of the

State in which they arise. If this be so when there is a final judgment, the mere publication of an opinion by a State Court in a cause where there is no final judgment will not bind the United States courts or oust them of their jurisdiction."

"So when a question falling under the laws or Constitution of the United States—a Federal question—is presented, the United States courts have a clear jurisdiction and would fail in the purpose for which they were created if they did not take jurisdiction, even though their decisions conflict with that of the State Court. My conclusion is, that there is nothing in the facts agreed to prevent this court hearing and determining the questions involved."

"It is well settled that the laws which are in force at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract as much as though they were incorporated in its items. This principle embraces the acts which effect its validity, construction, discharge and enforcement or the remedies under the contract. Von Hoffman v. The City of Quincy, 4 Wal. 535; Walker v. Whitehead, 16 Wal. 314; Edwards v. Kersey, 96 U. S., 595; Barnitz v. Beverly, 163 U. S., 118. And this means that the law as understood and construed by the courts where the contract is made and to be performed enters into the contract. Chief Justice Taney, in delivering the opinion of the court in Ohio L. & T. Co. v. Debolt, 16 Howard, 432, says: 'Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow these changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce, and the sound and true rule is, that if the contract when made was valid by the laws of a State, as then expounded by all the departments of its government, and administered by its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature, or decisions of its courts, altering the construction of the law.' Justice Harlan, delivering the opinion in Taylor v. Ypsilanti, 15 Otto, 71, quoting the above opinion with approval, says that this doctrine is no longer open to question in this court. 'It has been recognized for more than a quarter of a century and is an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws.' Several opinions are cited sustaining the view that the

construction of the State statute as far as contract rights acquired under it are concerned becomes as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment and the rights of the parties are to be determined according to the law as it is judicially construed to be when the bonds in question were put on the market as commercial paper."

"Under this principle it becomes of vital importance to know what was the law in North Carolina as enunciated by the highest court of the State at the time the contract under consideration was entered into in 1891, or what was the law of the State effecting such commercial paper in 1892, when the bonds were issued and sold to the plaintiff on the market in another State."

"It is admitted in the facts agreed that the Journal of the House of Representatives shows a failure to comply with Article 2, section 14, of the Constitution, but it is understood and agreed that this admission, as to what appears on the Journal, is only to be considered should the court decide that such impeaching testimony is admissible under the circumstances of this case."

"There was apparently both legislative and judicial authority, ample and complete, for the issue of the bonds in question, and the Supreme Court of the State, (116 N. C., 339), in a learned opinion decided all essential matters in favor of the validity of the bonds. As far as it goes the law of North Carolina, as understood by the courts and the legal profession, is embodied in that opinion. The act of the Legislature and other questions decided therein give validity to the bonds as set forth in the face of the bonds themselves—the legislative and judicial authority to issue such bonds. The purchaser, of course, should enquire into the power to issue bonds. He saw this set forth in the face of the bond itself, and if he enquired further or verified the record either personally or through an attorney learned in the law, neither would have been wiser or more learned than the Supreme Court of the State, which court at February Term, 1895, decided in favor of the validity of these bonds. If such purchaser or his attorney examined the act of the Legislature he found it certified to as required by the law of North Carolina and published in the volume of the public laws. Was it incumbent on him to look further?"

"In the same volume, 116 N. C., 223, (Carr v. Coke) in a case where it was alleged and offered to be proved by the Journals and other evidence, that an act of the Legislature had passed neither House of the General Assembly, but had been certified by the presiding officers, the Supreme Court of North Carolina held, emphasizing the line of decisions by that court, that 'where it appears that a bill has been duly signed by the presiding officers of the two Houses of the General Assembly the courts can not go behind such ratification to enquire whether it was fraudulently or erroneously enrolled before it had passed the requisite reading by each House.' A more extreme case can hardly be imagined—where the certificate of the presiding officers made law, affecting the commercial interests of the State, a bill which had not passed either House. The decision though was in conformity with what was said by Chief Justice Pearson, speaking for the court in Broadnax v. Groom, 64 N. C., 244, 'that the ratification certified by the Lieutenant-Governor and the Speaker of the House of Representatives makes it a matter of record which can not be impeached before the courts in a collateral way.' To the same effect is Gatling v. Tarboro, 78 N. C., 119, decided in 1878, and other decisions to the same effect. The judges recognized the gravity of the question in Carr v. Coke, and there were two dissenting opinions in which the distinction was drawn between a collateral and a direct attack upon the record, but the majority of the court decided the law as it has always been understood. The courts of the State, have adopted the English rule, and acted on the maxim, 'omnia præ sumuntur rite esse acta,' and that more importance is to be attached to the acts of the Lieutenant-Governor, the second highest officer of the State elected by the people, as presiding officer of the Senate, and Speaker of the House of Representatives, than to those of the Journal Clerk, irresponsible, and with much less at stake in his official acts. At the time these bonds were issued the law of North Carolina, as construed by the courts of the State, based both upon the ground of public policy and upon the ancient and well-settled rule of law, (whatever changes may have taken place since the judicial decision, which can only govern for the future,) was, that the copy of an act attested according to law by the presiding officers of the two Houses of the Legislature, and filed in the office of the Secretary of State, is conclusive proof of the enactment, and the contents of the statute of the State, and that such

attested copy can not be contradicted by the legislative journals, or in any other manner."

"This being the law at the time and the place where the contract embodied in the bond was entered into, the defendants are not entitled to the impeaching testimony embodied in the Journal of the House of Representatives; and the act of the Legislature under which the election was held, and the bonds issued, must be held to have been passed with all the solemnity and formality requisite to a valid act of the General Assembly of North Carolina; and the bonds issued in pursuance of such act are valid and binding upon the defendants in the cause. To hold otherwise would be to impair by judicial decision the obligation of a contract made in compliance with the law, which the Constitution of the United States does not permit."

* * * *

The following is the dissenting opinion of Judge Furches, of the Supreme Court of North Carolina, in this identical case, which opinion is concurred in by Chief Justice Faircloth. Speaking of the decision of the court, written by Judge Douglas, Judge Furches says:

"I understand the court to rest its opinion on two grounds—the want of power in the Commissioners to submit the proposition to the voters and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous and should be reversed. I admit that, if the Commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes these bonds are void, and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

"The charter (the ordinance of the convention) in express terms makes the charter of The Atlantic and North Carolina Railroad Company a part of the charter of The Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties to the capital stock of the company. being so, the charter of The Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of The Northwestern North Carolina Railroad Company.

Range Co. v. Carver, 118 N. C., 328, 24 S. E., 352.
Commissioners v. Higginbotham, 17 Kansas, 62.

"It is like an instrument referring to another instrument (Flaum v. Wallace, 103 N. C., 296, 9 S. E., 567), or where the complaint in one action refers to the complaint in another action for data (Alexander v. Norwood, 118 N. C., 381, 24 S. E., 119); they are to be read and considered together as one instrument. I have shown that the subscription made to this company (The Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in Hill v. Commissioners, supra. This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of Belo v. Commissioners, in a mandamus proceeding to compel their payment, and their legality was again sustained by this court.

Belo v. Commissioners, 76 N. C., 489.

"This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the Justices of the Peace, acting as a County Court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the Constitution of 1868, which did not go into effect until the 24th of April of that year. By this constitution and subsequent legislation the County Court was abolished, and the County Commissioners succeeded to their powers in this matter and in all such cases. It is so held by this court in Belo v. Commissioners, supra, and it is expressly so provided by the Legislature. Code, section 1997. Therefore, while the submission of the question in Wilkes was by the Commissioners, they were the successors of the Justices and the County Court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

"But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, it was passed before the Constitution of 1868 went into effect, and that it was thereby repealed. To support this position, Aspinwall v. Commissioners, 22 How. 364, and Lewis v. Pima Co., 155 U. S. 54, 15 Sup. Ct. 22, are cited by the court. Neither of these cases,

in my opinion, sustains the position for which they are cited. The first case cited (22 How.) is intended to raise the question of violating a contract under the Constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the Constitution of the State (Indiana) had been amended so as to prohibit any county in the State from issuing such bonds. But Daviess County proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the Constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended Constitution, amounted to a contract; and that the new Constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the Constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the Constitution of the United States.

"But it is denied by the defendants that the Constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes County from making this subscription or from issuing these bonds, as I expect to show. The case of Lewis v. Pima Co. arose out of the legislation of Arizona Territory. The Legislature of this Territory passed an act authorizing Pima County to issue bonds for the construction of a railroad. This being a Territorial government, it had no legislative powers except those granted by Congress. And it was held in that case that Congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of The Northwestern North Carolina Railroad was passed before the adoption of the Constitution of 1868, which took effect on the 22d of April of that year. But the Legislature passed an act, ratified on the 11th of August, 1868, as follows: 'Sec. 1. The General Assembly of North Carolina do enact, that an ordinance entitled "An ordinance to incorporate The Northwestern

North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed.' If there had been a repeal of this charter by the Constitution, which I contend there had not been, it seems to have been expressly re enacted in August, 1868. It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the Act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by any one for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I can not feel bound by an agreement as to what is the law. I refer to this Act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the Commissioners of Wilkes County to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the Constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters 'voting thereon shall be in favor of the subscription.' To this extent, and no further, did the Constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of The Code, which was admitted to have been passed as the Constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of The Code had been passed by the Legislature, as an amendment to this charter, with all the formalities and requirements of the Constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

"The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The Legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of The Northwestern North Carolina Railroad from Winston to Wilkesboro, for

the subscription of counties to its capital stock, and the issues of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and nays, as provided by the Constitution, and, for that reason, that the said act is void, under Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C., 214, 25 S. E. 966, and Commissioners v. Snuggs, 121 N. C., 400, 28 S. E., 539. But the Commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the Act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the Convention chartering said road. So that anyone seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter, that is, the ordinance of the Convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the Commissioners, except the Act of the 20th of February, 1879, and that, that act being void for the reasons heretofore stated, the Commissioners had no power to issue the bonds. I admit that this act is a nullity, and can not benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the Act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the Commissioners had any other authority except the said act of 1879.

"With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see Bigelow, Estop., pp. 4–7, and 356, and note 1: It is not the deed of the defendant, but of Isham (the grantor) only, by whom alone it is executed; and not being the deed of the defendant, it can not, as a deed, estop him from denying that the grantor had title. And the same principle is held in the case

of Northern Bank of Toledo v. Porter Tp. Trustees, 110 U. S., 608, 4 Sup. Ct., 254, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the Commissioners of Wilkes County had the power—legal authority—to issue these bonds? It is said in the opinion of the court that 'estoppels are mutual,' and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from Bigelow on Estoppel and from Northern Bank of Toledo v. Porter Tp. Trustees. But were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?"

* * * * * * * * * * *

Faircloth, C. J.: "I concur in the dissenting opinion."

I think the dissenting opinion of Judge Furches clearly establishes the fact that the bondholders are not estopped from claiming that the subscription to the capital stock of The Northwestern North Carolina Railroad, by the Commissioners of Wilkes County, and the bonds issued in payment thereof, were authorized by sections 1996 to 2000, inclusive, of The Code. It is admitted that these sections when first enacted, in 1869, were enacted in strict compliance with the requirements of the Constitution, and when re-enacted in The Code, 1883, the Court says: "All the sections of The Code were enacted by the General Assembly, having passed three several readings on three different days in either House, the yeas and nays on the second and third readings having been entered on the Journals of both Houses respectively."

Commissioners v. Snuggs, 121 N. C., 401.

In this case there is no question as to the regularity of all the details of subscription, vote and tax. The question is, was the subscription made and bonds issued "to aid in the completion of any railroad in which the county might have an interest"?

As before stated, work had begun on The Northwestern North Carolina Railroad prior to the passage of these sections in 1869; and, when this subscription was made in 1888, work on the extension to Wilkesboro had been in progress for over a year, and the road was uncompleted.

The only question remaining is, did citizens of the county "have an interest," as contemplated by the statute? Discussing this, in the Stanly County bond case, Judge Simonton says:

"To aid in building a railroad is a public purpose, and for the general welfare of the ordinary municipal corporations, such as counties, cities and towns, through which the road is to pass, and so is a corporate purpose. (Livingston County v. Darlington, 101 U.S., 407; Bolls v. Brimfield, 120 U. S., 759; Brown v. Hartford Commissioners, 100 N. C., 92)

"The public policy of all the States of the Union, notably North Carolina, recognize that railroads are of great public concern, and a great public benefit. None of these States have have shown this in a more marked degree than the State of North Carolina, which has expended vast sums in opening up the magnificent system of these public highways, developing every section of the State. It is evident, therefore, that in this Yadkin Railroad the citizens of the county of Stanly had an interest of a valuable and important character."

The interest of the citizens of Wilkes in The Northwestern North Carolina Railroad, when the subscription to the capital stock was made in 1888, I contend, was direct and pecuniary. In 1887 the Commissioners of Wilkes County had subscribed $100,000 to the capital stock of this road, if completed by a certain time in 1899, to, or near Wilkesboro. A majority of the qualified voters of said county had ratified said subscription. Technically and legally this subscription was in force in 1888, when second subscription was made, and it had not been declared invalid by any court of law. To this extent the citizens had a direct pecuniary interest, and, if the bondholders are not estopped from pleading it, the subscription and bonds were authorized by the aforesaid sections of The Code.

RICHARD N. HACKETT,
Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk

No. 642.

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Stipulation as to notice &c.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Feb. 20, 1899.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

STIPULATION TO WAIVE NOTICE OF THE MOTION OF DEFENDANTS TO AFFIRM AND DISMISS, AND THAT THIS CAUSE BE SUBMITTED ON SAID MOTION UPON THE ARGUMENTS ALREADY FILED BY COUNSEL.

The undersigned, counsel for plaintiffs in error, and for defendants, hereby stipulate and agree that the motion of defendants to advance, affirm and dismiss shall be heard on ~~March 25~~ A. D., 1899, counsel for plaintiffs in error hereby waiving the notice of three weeks prescribed by the rule of the Supreme Court, and consenting that said motion shall be submitted by counsel for defendants in the absence of counsel for plaintiffs in error.

It is further stipulated and agreed, that this cause be submitted on printed arguments, which will be filed by the undersigned before the said 20th day of ~~March.~~ February

RICHARD N. HACKETT,
Solicitor for Plaintiffs in Error.

A. C. AVERY,
Solicitor for Defendants.